

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,

Plaintiff,

v.

TYSON FOODS, INC., *et al.*,

Defendants.

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Case No. 4:05-CV-329-GKF-PJC

**STATE OF OKLAHOMA’S BRIEF IN SUPPORT OF FEES AND EXPENSES
TO BE AWARDED PURSUANT TO COURT ORDER [DKT. #2734]**

Pursuant to this Court’s November 4, 2009 Opinion and Order (Dkt. #2734), Plaintiff, the State of Oklahoma (“the State”), hereby submits its brief and affidavits in support of the fees and expenses that it incurred as a result of the Cargill Defendants’ (“Cargill”) counsel’s incorrect and incomplete responses to the State’s Interrogatories 1 and 6. (*See id.* at 36.)

I. INTRODUCTION

On November 4, 2009, this Court granted in part the State’s Motion for Sanctions Directed to the Cargill Defendants for Discovery Misconduct (Dkt. #2459). Specifically, the Court found that “Cargill and its attorneys have violated Rule 26(e) and 26(g) in the responses and certifications to [the State’s] Interrogatories 1 and 6” (Dkt. #2734 at 32) because Cargill’s attorneys knew that Cargill’s responses were false (*id.* at 31-32). The Court further concluded that “Cargill’s counsel violated Rule 26(g) in signing the interrogatory objections at issue as they knew they had [responsive information] and evaded stating their objections to the interrogatories based on attorney work product because they wrongly assumed that the factual information requested was protected.” (*Id.* at 35.)

The Court thus directed the State to file a brief and affidavits supporting the fees and expenses “incurred as a result of Cargill’s counsel’s incorrect and incomplete responses to the interrogatories; *e.g.*, expenses and fees incurred in supplementing the summary judgment motion as well as those incurred in seeking sanctions.” (*Id.* at 36.) As set forth below, the State incurred more than \$40,596.50 of reasonable attorney fees and \$159.25 of expenses. Accordingly, the State respectfully requests that the Court sanction Cargill’s counsel and award the State \$40,755.75.

II. LEGAL STANDARD

A sanction under Rule 26(g) “may include an order to pay the reasonable expenses, including attorney’s fees, caused by the violation.” Fed. R. Civ. P. 26(g)(3). “The nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances.” Fed. R. Civ. P. 26(g) advisory committee note (1983). That discretion includes the power to make a party “whole.” *See In re Byrd, Inc.*, 927 F.2d 1135, 1138 (10th Cir. 1991).

In determining reasonable expenses and fees to be awarded, courts use the lodestar method. *See Starlight Int’l, Inc. v. Herlihy*, 190 F.R.D. 587, 589 (D. Kan. 1999) (citing *White v. GMC*, 908 F.2d 675, 684-85 (10th Cir. 1990)); *Standard Oil Co. v. Osage Oil & Transp., Inc.*, 122 F.R.D. 267, 268 (N.D. Okla. 1988) (citing *Ramos v. Lamm*, 713 F.2d 546, 552 (10th Cir. 1983), *rev’d on other grounds, Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 483 U.S. 711 (1987)). Under that method:

[A] reasonable hourly rate is multiplied by the reasonable number of hours worked on the case. . . . The district court is required to exclude from the initial fee calculation hours that were not reasonably expended, *i.e.*, that are excessive, redundant or otherwise unnecessary. . . . Further, the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates.

Jones v. Eagle-North Hills Shopping Ctr., L.P., 478 F. Supp. 2d 1321, 1325-26 (E.D. Okla. 2007) (citations and internal quotation marks omitted); *accord Wells Fargo Bank, N.A. v. LaSalle Bank N.A.*, No. CIV-08-1125-C, 2009 U.S. Dist. LEXIS 107185, at *1-*3 (W.D. Okla. Nov. 17, 2009). The rule is that current hourly rates, rather than adjusted historical rates, should be used in setting a reasonable attorneys' fee award. *Ramos*, 713 F.2d at 555.

III. DISCUSSION

A. The State Has Incurred \$40,596.50 in Reasonable Attorneys' Fees as a Result of the Cargill Defendants' Counsel's Discovery Misconduct

1. The State's Counsel's Hourly Rates Are Reasonable

"The setting of a reasonable hourly rate is within the district court's discretion." *Jane L. v. Bangerter*, 61 F.3d 1505, 1509 (10th Cir. 1995). As a general rule, "[t]he reasonable hourly rate is that prevailing in the community for similar work." *Henderson v. Horace Mann Ins. Co.*, 560 F. Supp. 2d 1099, 1113 (N.D. Okla. 2008). That said, "a party who has already been the victim of vexatious and dilatory tactics should not heedlessly be revictimized by requiring him to introduce evidence to establish the prevailing local rate for a certain type of litigation." *Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1206-1207 (10th Cir. 2008) (distinguishing application of lodestar under 28 U.S.C. § 1927, which — like Rule 26(g)(3) — refers to attorneys' fees *actually incurred*, from civil-rights statutes, which merely refer to "a reasonable attorney's fee" (emphasis added)).¹

¹ Although the vast majority of fee-shifting cases arise in the civil rights context under 42 U.S.C. § 1988, *see, e.g., Ramos*, 713 F.2d at 550, the distinction between § 1988 and Rule 26(g)(3) bears emphasis where, as here, the party seeking sanctions is represented by out-of-state counsel. Compare 42 U.S.C. § 1988 (court "may allow the prevailing party . . . a reasonable attorney's fee. . . ." (emphasis added)) with Fed. R. Civ. P. 26(g)(3) (court "may include an order to pay the reasonable expenses, including attorney's fees. . . ." (emphasis added)).

In setting the hourly rate, courts consider what lawyers of comparable skill and experience would charge for their time. *Lippoldt v. Cole*, 468 F.3d 1204, 1225 (10th Cir. 2006). Even under § 1988, *see supra* note 1, where the subject of the litigation is unusual or requires the special skills of an out-of-state attorney, courts may look to the out-of-state attorney's customary rate. *See Ramos*, 713 F.2d at 555; *see also Swisher v. United States*, 262 F. Supp. 2d 1203, 1213 (D. Kan. 2003) (“[because] this case presents issues not routinely litigated in the District of Kansas, the court believes plaintiffs have set forth a sufficient basis for the court to conclude that the relevant market for determining attorneys’ fees in this case must be broader than the state of Kansas”). And in the context of § 1927 — which, similar to Rule 26(g)(3), permits courts to sanction dilatory practices with, *inter alia*, “attorneys’ fees reasonably incurred because of such conduct” — the Tenth Circuit has stated that “one who chose what he considered appropriate counsel should not be obliged to procure new, cheaper lawyers just to deal with a filing that is, after all, sanctionable.” *Hamilton*, 519 F.3d at 1207.

Here, the State seeks the following reasonable hourly rates for its attorneys:

<u>Attorney</u>	<u>Law Firm</u>	<u>Title</u>	<u>Rate</u>
Louis W. Bullock	Bullock, Bullock & Blakemore, PLLC	Partner	\$380
Robert Blakemore	Bullock, Bullock & Blakemore, PLLC	Partner	\$280
David Page	Riggs, Abney, Neal, Turpen, Orbison & Lewis Inc.	Of counsel	\$275
Richard Garren	Riggs, Abney, Neal, Turpen, Orbison & Lewis Inc.	Partner	\$300
Ingrid L. Moll	Motley Rice LLC	Member	\$500
Mathew P. Jasinski	Motley Rice LLC	Associate	\$300

With regard to the above Tulsa-based attorneys, namely, Messrs. Bullock, Blakemore, Page, and Garren, the above rates are in keeping with those prevailing in the Tulsa community. By way of

example only, in 2003 this Court (*Holmes, J.*) approved \$250 (in 2003 dollars)² as a reasonable hourly rate for Attorney Bullock, whom the Court described as “among the most well-respected attorneys in the Tulsa community and [who] is particularly skilled and experienced as a litigator, generally” *Johnson v. City of Tulsa*, No. 94-CV-39, 2003 WL 24015152, at *2 (N.D. Okla. Aug. 29, 2003). Moreover, in 2004, the Court upheld an hourly rate of \$250 in an oil and gas take or pay contract dispute that the Court found to be “not extraordinarily complex.” *Henderson*, 560 F. Supp. 2d at 1113 (citing *Oklahoma Natural Gas Co. v. Apache Corp.*, 355 F. Supp. 2d 1246, 1255 (N.D. Okla. 2004)).

This case, in contrast, is uniquely complex and hotly contested. (*See, e.g.*, 09/15/09 Hearing Tr. at 32 (“THE COURT: . . . These are difficult issues and . . . there are numerous issues here that have never been addressed by a court.”).) Indeed, not only is environmental litigation “tremendously complex, lengthy, and expensive,” *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1191 (9th Cir. 2000), but the parties here also have fought over “every inch of ground” (*see, e.g.*, Trial Tr. Vol. XX, 10/15/09, at 2288:14-16).³ With respect to Cargill alone, the State faces the 500-lawyer firm of Faegre & Benson LLP and Rhodes, Hieronymus, Jones, Tucker & Gable, PLLC, Cargill’s local counsel.

Given the complexity, uniqueness, and expense of this case, the State also has retained the national litigation firm Motley Rice LLC. Ms. Moll and Mr. Jasinski primarily practice out of that firm’s Connecticut office. *See Kersh v. Board of County Comm’rs*, 851 F. Supp. 1541, 1544 (D. Wyo. 1994) (approving out-of-town rates upon considering whether, *inter alia*, case

² Adjusted for inflation, \$250 in 2003 is equivalent to approximately \$294 in 2009. *See* U.S. Bureau of Labor Statistics, CPI Inflation Calculator, http://www.bls.gov/data/inflation_calculator.htm.

³ According to one of the defense attorneys involved, Defendants collectively are expending approximately \$10,000 per hour. (Trial Tr. Vol. XVIII, 10/14/09, at 1986:9-14.)

required “specialized expertise not found in the local market” and “significant financial resources”). The rates listed above represent their customary private practice rates, *see Ramos*, 713 F.2d at 555 (finding customary rate to be a relevant factor), and are fees charged by attorneys of comparable experience in that market, *see Swisher*, 262 F. Supp. 2d at 1213-14 (finding Washington, D.C.-based attorney’s 2003⁴ hourly rate of \$450 to be reasonable). Their work in connection with the fees sought in this application relate to preparation of the Motion for Sanctions directed to the Cargill Defendants. Moreover, as explained in the Declaration of Ingrid L. Moll (attached as Exhibit B), not all hours expended by Motley Rice LLC on matters relating to seeking sanctions are included in this fee application. (*See id.* ¶ 4.)

The State asserts that the above rates are eminently reasonable market rates based upon the level of experience and skill of each attorney, rates that are paid to other lawyers of similar experience and skill, and in light of the complexity, stakes, expense, and hard-fought nature of this lawsuit.

2. The Time Incurred by the State’s Lawyers in Supplementing the Summary Judgment Motion and in Seeking Sanctions Is Reasonable

“In order for the Court to determine the ‘hours reasonably expended’ the claimant must submit detailed time records and offer evidence of the reasonable value of the services performed, predicated on standards within the local legal community.” *Henderson*, 560 F. Supp. 2d at 1114 (internal quotation marks omitted). “Hours that are not properly billed to one’s client may not be billed to one’s adversary. . . . The hours used in the lodestar calculation should only be productive time.” *Id.* (citation omitted).

⁴ Adjusted for inflation, \$450 in 2003 is equivalent to approximately \$530 in 2009. *See* U.S. Bureau of Labor Statistics, CPI Inflation Calculator, http://www.bls.gov/data/inflation_calculator.htm

The attached exhibits, which are sworn statements of counsel, set forth the reasonable value of the services performed on behalf of the State in connection with supplementing the summary judgment record and seeking sanctions for Cargill's discovery misconduct. *See* Exhibits A (Affidavit of Louis W. Bullock), B (Declaration of Ingrid L. Moll), and C (Declaration of Richard Garren) attached hereto. As explained in the attached affidavits and/or declarations of Attorneys Bullock, Moll, and Garren, the time for which an award is sought is hard billable time, reasonably expended on matters and activities that are compensable. *See, e.g., Ramos*, 713 F.2d at 553; *Jones*, 478 F. Supp. 2d at 1326. These hours are based upon contemporaneous time records kept in the ordinary course of business by each law firm represented. Furthermore, the State's lawyers have exercised billing judgment in making a good faith effort to exclude from the fee request hours "that are excessive, redundant or otherwise unnecessary." 478 F. Supp. 2d at 1325.

In sum, the State requests a fee award of \$40,596.50.

B. The State Reasonably Incurred \$159.25 in Expenses in Supplementing the Summary Judgment Motion and in Seeking Sanctions

Finally, the State seeks recovery of reasonable expenses relating to obtaining the transcript of the hearing on the State's Motion for Sanctions, which was heard before Magistrate Judge Cleary on September 25, 2009 and which amounted to \$159.25 (*see* Moll Decl. (Exhibit B)). *See Starlight Int'l*, 190 F.R.D. at 593 ("The court may properly include such expenses in an award of sanctions."). Such an expense is of the type in this community that would be typically billed to clients, and — coupled with the attorneys' fees set out above — is necessary and appropriate to deter future wrongdoing. *See id.*

IV. CONCLUSION

For the foregoing reasons, the Court should award fees in the amount of \$40,596.50 and expenses in the amount of \$159.25 in accordance with the Court's directive (Dkt. #2734).

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I hereby certify that on this 24th day of December, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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